Neutral Citation Number: [2020] EWHC 535 (Comm)

Case No: CL-2017-000675

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice,
Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 9 March 2020

Before :

MRS JUSTICE COCKERILL DBE

- -

Between :

NIRAMAX GROUP LIMITED	**Claimant**
- and -	
ZURICH INSURANCE PLC	**Defendant**

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- -

Mr Ben Elkington Q.C. and Mr Ben Smiley (instructed by **Edwin Coe LLP**) for the **Claimants**
Mr Graham Eklund Q.C. and Mr Carl Troman (instructed by **BLM Law LLP**) for the **Defendants**

Hearing dates: 2nd, 3rd, 4th, 5th, 9th, 10th, 11th, 12th December 2019
Draft Judgment sent to parties: 27 February 2020

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Cockerill J:

1. On the night of 4 December 2015 employees of the Claimant recycling company, Niramax Group Limited ("Niramax"), were working, as they often did, through the night. A fire started in the engine compartment of a grab which was in a building known as the "Rec Shed". Later investigation suggested that a hydraulic hose had failed, releasing oil onto a hot pipe; a simple mishap. The staff took prompt action and thought they had put the fire out; but they had not. Burning embers remained and in unusually strong winds they were blown elsewhere. The fire thus spread into a new building which contained a brand new multi-million pound sorting machine. That machine, known as "the Eggersmann plant", was destroyed, together with other items of plant. This case concerns a claim in the amount of a little over £4.5 million for that loss.

2. Niramax made a claim on the policy of insurance covering the Eggersmann plant, but the claim was not paid. Its insurers, Zurich, who had only recently and reluctantly added the Eggersmann plant to a policy of all risks contractors' mobile plant insurance, found a number of items which concerned them, and they reserved their rights to avoid the Policy. One thing which particularly concerned them was that it appeared to them that Niramax had as a "shadow director" one Mr Shaun Morfitt, who had been convicted of a machete attack.

3. So, after the insurance claim had remained unpaid for some time, Niramax sued Zurich in this Court. In its Defence Zurich said that it was entitled to avoid the policy of insurance because of Mr Morfitt's association with Niramax and because of a variety of other facts which it was not told, such as the fact that there had been a fire at an associated site in 2012.

4. Although Zurich no longer maintains that it is entitled to avoid because of Mr Morfitt's position, it contends that its avoidance is good for a variety of other reasons. In particular it is Zurich's case that a number of issues regarding Niramax's buildings insurance and safety precautions were not disclosed, and it is also argued that certain past issues relating to the company and its Directors were "moral hazards" which should have been and were not disclosed.

The Trial

5. I have heard this case over two weeks. Factual and expert evidence has been called for both sides.

6. The Claimant called two factual witnesses. The first, Mr Antropik, had been the Managing Director of Niramax between 2012 and 2017. He was a quiet and calm witness. Although his memory was not good, my impression was that he was at all times doing his best to assist the Court. He was absolutely scrupulous about making clear what he did and did not recall. Mr Betts, who worked on the financial side for Niramax, was understandably a little defensive given his involvement in the insurance proposals and the nature of some of the defences being run, but also gave me the impression that he was truthful.

7. For the Defendants, the first and main factual witness called was Mr Penny, who was the head of the Engineering Risks department at Zurich. It was he who was said to have

been the person who would, if proper disclosure had been made, have considered the risk; and hence he whose inducement was key.

8. Mr Penny's post was a senior post with 40 underwriters from around the country reporting to him. At this time about 70% of his work was regulatory and managerial, but for about 30% of the time he was a referral point for complex risks from those underwriters.

9. I found Mr Penny to be an impressive witness. His expertise in his business was plain. He was clear, helpful and absolutely frank and straightforward. He thought carefully about the questions he was asked and gave the impression of trying to recall accurately. He did not shy away either from indicating where he thought that errors had been made (including on occasion by himself) or from indicating the limits of his recollection. While I have not on all occasions below accepted his evidence as accurate, that has been largely owing to the circumstances in which he has ended up giving evidence. I have no hesitation in accepting that he was doing his very best to assist the Court.

10. The other witnesses for the Defendant, Ms Jones, then the assistant marketing underwriter, Mr Armstrong, the manager in charge of underwriting development, Mr Trinham, a senior underwriter in the engineering team and Mr Hutchinson, the other senior underwriter involved, were all in my judgment honest witnesses attempting to assist the Court. Mr Hutchinson in particular, who played a key role in the events which underpin this dispute, appeared to be a down to earth and knowledgeable underwriter of considerable experience.

11. As for the expert evidence there were two disciplines: underwriting and plant valuation. As regards the former, Mr McIlduff for Niramax was an experienced underwriter, in the market since 1965, having spent much of his career with RSA plc. Mr Coates, who was called by Zurich, had 36 years' experience as a commercial underwriter including as Head of UK Property and Casualty at Allianz Insurance plc.

12. As regards the Plant Valuers, Mr Correa and Professor Sheldon, it was essentially common ground that the task with which they were entrusted was difficult, in that they were trying to value property as of four years ago which, in the case of the Eggersmann, is unique and, in the case of the Liebherr machines, is specialist and examples are not currently on the market in the UK. Both had done their best to assist; indeed, it was positively useful to have two somewhat differing approaches.

13. One further point should be added here. Niramax submitted that I should draw adverse inferences against Zurich because Zurich did not call two witnesses (Mr Smith and Mr Long). This submission was made in reliance on the principle in *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324 at 340. This submission hinges on the question of the identity of the underwriter (actual or hypothetical) of the risks in question, which is dealt with below.

The Facts

14. Niramax was incorporated in May 2001. Prior to February 2008 it was called Niramax Recycling & Manufacturing Limited.

15. Niramax's principal activities are waste collection and waste recycling. It is a substantial concern. In the last financial year before the fire (namely the year ended 31 March 2015) its turnover was £36m, its gross profit was £9.7m and its net pre-tax profit was £4.4m (up from £33m, £7.1m and £2.3m respectively in the previous year). Its balance sheet was £12.6m, up from £11m in the previous year.

16. Niramax's parent company is Niramax Holdings Limited ("NHL") which, prior to June 2009, was called Niramax Waste Services Ltd. NHL has another subsidiary called SWS Limited ("SWS"). Part of the business now carried on by Niramax used to be carried on by SWS. Niramax purchased that business in 2007.

17. NHL is ultimately controlled by Mr Neil Elliott, who also has an interest in a company called Seneca Investments & Developments Limited ("Seneca").

18. Niramax's main premises are at Thomlinson Road, Longhill Industrial Estate, Hartlepool TS25 1NS ("Thomlinson Road") at which it carries out waste recycling. It began operating from Thomlinson Road in 2007.

19. Niramax also processes end of life tyres, which it shreds into tyre crumb and then sells. This part of its business takes place at 6 – 8 Tofts Road, Tofts Farm Industrial Estate, Brenda Road, Hartlepool TS25 2BQ ("Tofts Road West"). This site is about 3 miles from the main Thomlinson Road site.

20. About a mile from Tofts Road West is a site which in 2012 was owned and operated by Seneca called Tofts Road East. Niramax used to store tyre crumb on the Tofts Road East site.

21. In 2011 Niramax began operating a waste transfer station at Monument Park, Pattison Industrial Estate, Washington NE38 8QU ("the Washington Site").

The insurance of Niramax's plant.

22. For many years SWS and then Niramax paid for a suite of insurance policies with Zurich designed to cover its plant and machinery. Those policies included the following:

    i) A contractor's plant policy (policy number FL572863) which originally incepted in 2006 and was renewed thereafter. It is this policy, or to be more precise the renewed policy which incepted on 15 December 2014 ("the Policy") which forms the basis of the claim in these proceedings.

    ii) An inspection contract and plant protection policy (pursuant to which Zurich's engineers routinely inspected the plant at Thomlinson Road).

    iii) A sudden and unforeseen damage policy.

    iv) A second contractor's plant policy (AG618970) ("the AG Policy") which provided cover for engineering plant.

    v) SWS and Niramax also had fleet insurance with Zurich.

Original writing and renewal of the Policy

23. In 2006 SWS was represented by HSBC. On 30th August 2006 HSBC sent a presentation to Zurich seeking a quote for contractor's plant cover. The cover sought was for owned and hired-in plant, irrespective of where in the United Kingdom the plant was located when it was lost or damaged.

24. The risk was underwritten by David Long of Zurich ("Mr Long"). He offered cover for SWS, and that quote was accepted. The sum insured was £460,000 for owned plant and £100,000 for hired-in plant.

25. The underwriting process for this risk, now and later, was not exhaustive. The evidence was that this was a type of insurance which was commoditised and streamlined as a costs-saving exercise. There was no proposal form. There were only three inputs into the calculation of a premium: sums insured, trade and claims experience. This was apparently a standard approach across the industry; the experts did not cavil at it.

26. The premium was calculated with an error in Niramax's favour, because Mr Long failed to take into account the claims record in respect of hired in plant.

27. The Policy provided all risks cover for loss or damage to the Claimant's owned plant whilst at any situation in the United Kingdom. The Policy also provided all risk cover for hired-in plant whilst in the Claimant's custody or under its control at any situation in the United Kingdom.

28. Towards the end of the 2006/07 policy period it was agreed that the policy period should be extended to 15th December 2007 as the business was being sold. Thus, the renewal date became 15 December each year. This remained the renewal date in 2014 and 2015.

29. In December 2007 a renewal premium was calculated by Mr Trinham of Zurich. Mr Trinham offered renewal terms, which were accepted. Mr Trinham replicated Mr Long's mistake on the premium.

30. In 2008, Mr Sweeney of Sweeney Insurance Associates Limited began acting as Niramax's insurance broker. In November 2008 the renewal premium was calculated by Ms Lorraine Matthews of Zurich. She offered renewal terms, which were accepted. During the policy year Niramax was added to the Policy.

31. In December 2009 the renewal premium was calculated by Ms Matthews. She issued renewal terms, which were accepted.

32. In December 2010 Zurich again invited renewal of the Policy. Its invitation was accepted. During the policy year the sum insured for owned plant was increased to £812,300.

33. In November 2011 the renewal premium was calculated by Mr Trinham and Zurich again invited renewal of the Policy. That invitation was accepted.

34. In November 2012 the renewal premium was calculated by Ms Sally Passey. Zurich offered renewal terms, which were accepted.

35. In October 2013 the renewal premium was calculated by Ms Matthews again and renewal terms offered. The proposed renewal terms were accepted.

36. During the 2013/14 policy year Niramax's plant was inspected by Zurich's engineers in January 2014 and July 2014. These reports were limited to looking at the plant, and noting which were operational, defective, or otherwise worthy of note.

37. I pause the story of the plant insurance here to complete the rest of the backdrop to the renewal of the Policy for the 2014-2015 year.

The change in sentiment regarding the waste business

38. The next point to note is that throughout this period there had been building in the minds of the insurance market an increasing discomfort with the waste business. By 2014 it was Mr Penny's evidence that the market generally and Zurich in particular was turning away from recycling risks, and recycling plant risks in particular. As I shall explain in more detail below by 2014 Zurich were in general writing no new waste risks, and "encouraging" existing risks elsewhere – it would lose 40% of its recycling risks during this period.

39. The situation was described in emails Niramax received from its broker Mr Sweeney on 30 January 2013 and a year later on 5 February 2014.

40. In the email to Niramax dated 30 January 2013 about Commercial Policy Renewals, Mr Sweeney wrote:

> "These are extremely challenging times from an insurance perspective within the recycling industry. Markets are extremely limited….
>
> The waste industry has been viewed as an extremely high risk for many years…
>
> When you flip the coin and look at the material damage insurance, overall it could not be worse news. Research on the Internet has led me to a very useful site which mentions that there have been 59 fires at recycling centres in Great Britain in 2012 in other words over 1 fire a week on average.
>
> Essentially there are 3 possibly 4 insurance companies when it comes to material damage cover for the recycling/waste industry."

41. In his email to Niramax a little under a year later dated 5 February 2014, Mr Sweeney wrote:

> "Unfortunately, the recycle market from an insurance perspective particularly where material damage is concerned has deteriorated somewhat in the last year or so. Last year there were 3 companies offering terms and we placed you with the cheaper of the 3, Aviva which also happened to be the best. If you recall there was nagging problems in relation to accumulation of waste, storage of waste, et cetera and after many, many claims Aviva /Core Underwriting have taken the decision that they are out of

> the market. This has effectively [sic] Recyclesure and Catlin. We obtained quotations from both of them sources, and the Recyclesure one was slightly cheaper so we went ahead with that one. It is just my worry that if the survey does not go well on 14th February we may be back to square one.
>
> They will be looking primarily at fire precautions that you are taking we need to really have a few areas under control if at all possible which I would append below:"

The Buildings Cover

42. The second point to note is the parallel story of Niramax's buildings cover. This is as follows.

43. For the 2010/11 year Niramax's cover was placed with Paladin, which subsequently withdrew from the market. There were no claims on this policy.

44. For the 2011/12 year Niramax's cover was placed, through a Lloyds's placing broker called Miles Smith, with Recyclesure (underwritten by various Lloyds' syndicates). A survey was carried out in April 2011. A copy of this survey was sent to Mr Sweeney. There was 1 risk improvement, which was complied with. Again, there were no claims on the policy.

45. For the 2012/13 year Niramax's cover was again placed through Miles Smith, but this time with Core Underwriting (underwritten by Aviva). A survey was carried out in December 2011 before Aviva agreed to come on cover. A copy of that survey report was not sent to Mr Sweeney. Yet again, there were no claims on the policy.

46. For the 2013/14 year the cover was once again placed, through Miles Smith, with Core Underwriting (underwritten by Aviva). A pre-renewal survey was carried out on 18 January 2013 before Core Underwriting agreed to renewal. A post-renewal survey was carried out on 8 March 2013, following which risk improvements were sent to Niramax. Neither of the survey reports was sent to Mr Sweeney. Once again, there were no claims during the year.

47. Core Underwriting / Aviva did not offer renewal terms for the 2014/15 year due to a change in its underwriting criteria. Therefore, Mr Sweeney approached both Miles Smith and Recyclesure, to try to find replacement cover for the 2014/15 year. Recyclesure was an appointed representative of Direct Insurance Group Plc.

48. On 31 January 2014 Recyclesure provided Mr Sweeney with quotes for cover with Millennium Insurance for £5,000,000 of cover for £80,250 with a £25,000 excess. A quote was also provided by Miles Smith for cover with a facility led by Catlin. The premium offered for cover of £4,334,900 was £91,899.88 with a £50,000 excess. Although Lloyd's security was seen as more satisfactory by Niramax, Niramax (perhaps unsurprisingly) accepted the quotation provided by Recyclesure, declining the quotation obtained by Miles Smith.

49. Thus, for the 2014/15 year Niramax's cover was arranged by Mr Sweeney and Recyclesure with Millennium. The Millennium policy provided cover for both

Thomlinson Road and the Washington Site. Millennium's quote was "subject to survey".

50. That survey took place on 14 February 2014. Following this survey, a risk survey report was prepared by Paul James of Secon Surveyors & Engineering Consultants, instructed by Direct for Millennium.

51. On 24 February 2014 Direct Insurance sent an e-mail to Mr Sweeney attaching a provisional risk requirement report, which was being referred to the underwriter for agreement/comment. Mr Sweeney did not send that provisional report to Niramax.

52. The discomfort about the risks of the waste market, to which reference has already been made, was again expressed in an email from Hannah Thurgood of Direct Insurance on behalf of Millennium dated 24 February 2014 after having received the provisional risk requirements report from Mr James. She wrote to Mr Sweeney:

> "Please find enclosed the provisional risk requirements report which we received this morning… In the meantime, please pass the report to the insured and ensure they are aware of and understand all the requirements and ensure that they are working to complete them within the given timescales. Following underwriter's agreement, it will be a condition precedent to the liability of insurers that all risk requirements are completed within the given timescale… It is therefore important that all requirements are addressed as a matter of urgency."

53. On 27 February 2014 Direct Insurance sent Mr Sweeney the revised report. Its provisions – and in particular the numerous risk requirements imposed - were at the heart of Zurich's defence to this action.

54. There were 3 risk requirements for the Washington site:

    i) An automatic fire detection system in the areas where waste was stored;

    ii) CCTV cameras were to be installed outside and inside areas of the process/storage building and were to be recorded off-site by a third party security company at all times;

    iii) Hot-spot checking procedures.

55. There were 7 risk requirements for Thomlinson Road. The first two covered storage in bunkers, the third CCTV cameras, the fourth the electrical installation compliance. The fifth was for the construction of a fire partition 6m distant from the building to keep the timber stockpile that distance from the building. The seventh was an adjuration to keep up the good work in having regular security patrols.

56. Requirement No 6 - perhaps the key requirement for the purposes of this case - stated: "*3 x fixed Shredders within Black Sand Building: It is necessary to protect shredders by means of an automatic Fire Suppression System. Timescale: within 30 days of survey (by 16 March 14).*"

57. One problem was that this requirement for the shredders to be fitted with an automatic fire suppression system was imprecise and Niramax was left somewhat uncertain about what was needed.

58. When the fire suppression requirement was first imposed, Mr Wanless of Niramax contacted a company called Fire Knockout based in Holland which explained that there was a multitude of systems and that they would need to undertake a survey. Niramax seem to have initially intended to proceed with Fire Knockout, but on being told about the multiplicity of options it failed to move things forward. The date mentioned in the Risk Requirements came and went.

59. By 30 May 2014 a survey of the shredders had been carried out by a potential installer of a fire suppression system, namely Peterlee Fire Company. That company indicated that it would put together some budget prices based on its survey notes. However, no such quotation was received and it does not appear to have been chased.

60. On 12 June 2014 Millennium chased Mr Sweeney for an update regarding implementation of the risk requirements. Mr Sweeney's handwritten note on that email indicates that he would tell Millennium again that all risk requirements were "done". This appears to have been actioned, as on 18 June 2014, Millennium thanked him for the update – but required more detail.

61. On 14 July 2014 Mr Sweeney said to Millennium that his understanding was that every one of these risk improvements has been carried out. He then on 21 July 2014 emailed Messrs Wanless and Antropik, chasing for information/confirmation regarding risk requirement implementation and asked for a meeting to be able to draw a line under it. He warned of an increase in the excess/premium. He warned again on 14 August 2014, after receiving a chasing phone call from Millennium.

62. On 2 September 2014 Direct Insurance asked Niramax to contact Fireward "*who will be able to recommend a suitable suppression system*". It was the first time that Fireward's name had been mentioned to Niramax. Millennium were also chasing about the CCTV system. Further chasers followed in late September.

63. By October 2014, there were two key risk requirements outstanding: that requiring installation of the automatic Fire Suppression System on the shredders at Hartlepool and the installation of CCTV coverage at Washington. In addition, the following had also not been complied with: fire detection at Washington and the IEE certificate at Hartlepool.

64. Chasers were sent in early and mid-October 2014 asking for an urgent update on compliance. Mr Sweeney indicated that he was talking to his clients, but "*answer came there none*".

65. Another chaser was sent in the morning of 21 October 2014. Mr Sweeney promised a report "later today". In the early afternoon of 21 October 2014 Direct Insurance informed Mr Sweeney that, unless a full explanation on all risk improvements was provided by 5pm, a co-insurance clause would apply. Millennium indicated it would impose special terms on Niramax, effective that day, increasing the deductible/excess to £250,000 per claim and requiring Niramax to self-insure for 35% of the balance of any loss.

66. Mr Sweeney responded to Direct Insurance, explaining that it was not a case of Niramax doing nothing. In respect of CCTV, Niramax had contacted several CCTV companies as there were conflicting views as to the best way to deal with things; and Niramax had upgraded its system since the survey.

67. On 21 October 2014 at 16:05, an extension was granted until 22 October 2014 and if a satisfactory response was not received by then, the special terms would be applied automatically.

68. The outstanding risk requirements were not satisfied and no satisfactory response was provided to Direct or Millennium by that new deadline. As a result, the special terms came into effect on 22 October 2014. A file note of Mr Sweeney's dated 22 October 2014 (presumably as a result of a meeting with Niramax) recorded that Mr Sweeney was to contact Fireward "*to get it done*". The note also recorded in relation to the CCTV "*Euro Security came on site and quoted lot of money*" and set out information which appears to have been provided to Mr Sweeney by Niramax.

69. On 24 October 2014, Mr Sweeney e-mailed Secon and Direct Insurance attaching an invoice for improvements to the existing CCTV and details regarding the CCTV system in place. Mr Sweeney further set out the 24 hour operation at the site, with the security guard and referred to matters which reduced the fire risk at Niramax. He finished: "*in the light of the above can we waive the conditions imposed as frankly for an operation like this I feel they are grossly unfair.*"

70. On 29 October 2014 Direct wrote to Mr Sweeney rejecting his plea and advising that both CCTV and fire detection were outstanding at Washington and the IEE certificate and fire suppression were outstanding at Hartlepool and that all outstanding items were to be confirmed as done prior to considering the removal of the co-insurance clause. However, the CCTV requirement was removed on 14 November 2014.

71. In early November 2014 Niramax spoke to Fireward about a suitable fire suppression system. A survey by Fireward was arranged. Niramax sent an email dated 11 November 2014 in which it was stated:

> "We are looking for various options to comply with insurance requirements because as you well know within the industry now fires at waste sites are seen as a big risk… This email is to start a dialogue with you but I am available next Tuesday for a site visit to discuss options."

72. On 17 November 2014 Mr Wanless reported to Mr Elliott that he was chatting to 3 companies trying to pin down a system that suited best.

73. On 18 November 2014 Fireward carried out a survey of Niramax's machinery. The following day it sent Mr Wanless details of a suppression system and indicated it was preparing options for Niramax.

74. On 25 November 2014 Fireward provided a quotation to Niramax for various different options.

75. On 26 November 2014 Peterlee Fire Company finally provided Niramax with a quotation for the supply of a fire suppression system.

76. On 4 December 2014 Mr Sweeney sent the Fireward and Peterlee quotations to Direct Insurance. Mr Antropik explained that Niramax did this because the fire suppression system was something it had not experienced before and Niramax wanted to make sure it complied. On 12 December 2014 Mr Sweeney chased for a response to that e-mail.

77. On 15 December 2014 Direct Insurance replied to Mr Sweeney's e-mail stating that the Fireward fire suppression system should be fitted.

78. By this stage it was renewal time. For the 2015/16 year, Mr Sweeney sought a renewal quote from Millennium, as well as approaching a number of other placing brokers for quotations, including Miles Smith. Mr Sweeney flagged the issues as to the requirements and sought "*a very sensible and indeed practical approach going forward*". He expressly asked Millennium to quote on the basis that the fire suppression systems would be fitted at Thomlinson Road.

79. Mr Sweeney also sent a proposal form to Direct Insurance on 14 January 2015. The proposal declared that there had been no previous material damage claims in the last 10 years. This was not accurate; in fact, Niramax had made claims against Zurich for just over £70,000 in the prior few years, as had been referred to by Mr Sweeney in an email to Niramax dated 17 December 2014, approximately a month earlier.

80. The same day Direct Insurance confirmed internally that there were no claims during the year.

81. On 23 January 2015 Direct Insurance issued a quote on behalf of Millennium. This quote was for cover which contained a number of conditions precedent. In the Waste & Recycling Placing Slip signed on 22 January 2015, it was stated that there was to be an additional condition precedent that a Fireward Automatic Fire Suppression system was to be installed in respect of internal shredders.

82. Contract terms for renewal were set out in contract endorsement number 001 effective from 1 February 2015. Endorsement 001 included the following condition precedent entitled "*Fireward Automatic Fire Suppression condition precedent*": "*It is a condition precedent to the liability of Insurers that all internal shredders used with buildings are fitted with a Fireward Automatic Fire Suppression system or a fire suppression system of similar specification.*" The Contract terms were sent by Direct Insurance to Mr Sweeney on 23 January 2015.

83. Meanwhile Miles Smith sought to place the cover with a line of insurers led by Aspen Insurance. On 21 January 2015 Mr Sweeney sent Miles Smith further documents. Those documents included an unsigned Miles Smith proposal which had been completed by Mr Sweeney which Zurich relies upon as containing an incorrect statement as to whether there had been any special terms imposed. The question was: "*Have any insurers in the last five years declined to insure … cancelled … or imposed special terms?*". The box for No was plainly ticked.

84. Mr Sweeney's e-mail of 21 January 2015 was not sent or copied to anyone at Niramax.

85. Aspen required a pre-inception survey to take place. The survey took place on 23 January 2015. At the survey Niramax stated that a fire suppression system for the internal shredders would be installed in 8 – 12 weeks. The overall risk rating was stated to be *"D: Below Average*". At the survey, Mr Antropik and Mr Green of Niramax were present. The insurance claim history was recorded as being "*As per presentation*". The external storage arrangements, in the Recycling Reclamation building, for which Niramax did not require insurance, were nevertheless described as "*Not acceptable*", due to the risks which those storage arrangements posed to insured buildings on the site. It noted that internal shredders should be subject to automatic fire suppression systems. Overall general housekeeping and stock control were noted as areas of concern, but Mr Antropik's positive attitude was noted and the risk rating on completion of requirements was considered *"Acceptable"*. A firm quotation followed on 29 January 2015. This comprised an offer of cover for Thomlinson Road for the 2015/16 year (at a premium of £75,695), and was not subject to Aspen receiving a signed proposal form.

86. Millennium wanted to continue to insure Niramax. On 29 January it offered renewal terms, including (i) the installation of the fire suppression systems (i.e. the basis on which Mr Sweeney had sought renewal terms), and (ii) the removal at renewal of the special terms previously imposed. On the last day of the policy, Millennium offered a free 14 day extension of cover, during which period it would arrange for Thomlinson Road to be re-surveyed. Mr Sweeney accepted that 14 day extension. Millennium therefore extended the policy by 14 days. This extension was noted in Contract Endorsement Number 007. There was originally an issue about whether it removed the special terms previously imposed. However on closer examination of the (slightly confusingly worded) endorsement it because apparent, and Mr Penny accepted, that Millennium had removed the special terms at this point.

87. The re-survey for Millennium took place on 5 February 2015. Mr Sweeney then sought the final renewal terms from Millennium, and once again asked for those terms to be based on a fire suppression system for the internal shredders being installed. Millennium then offered its renewal terms on 11 February 2015. Millennium did not offer cover for Washington Road "*due to the non-completion of survey requirements and the lack of any fire detection system or CCTV system incorporating heat/temperature sensors.*" The premium was £72,518.12.

88. Meanwhile on 13 February 2015 Miles Smith passed on to Mr Sweeney Aspen's offer of cover for both Thomlinson Road and the Washington site for the 2015/16 year (at a premium of £86,441.65). Again, the offer was not stated to be subject to Aspen receiving a signed proposal form.

89. Aspen offered to hold covered commencing on 15 February 2015. It appears that while Aspen had not expressed cover to be subject to receiving proposal forms, it did in fact require them. On 23 February 2015 Miles Smith asked for signed and dated forms "*as soon as possible. Normally Aspen would not bind cover without the signed props*", and Mr Sweeney noted the need for these with an asterisk marking in his notes. The forms were chased by Miles Smith again on 12 March 2015 in an email which also sought an update as to where Niramax was with the installation of the fire suppression system, with the then current deadline being 14 March.

90. Niramax completed two proposal forms. The Aspen proposal form dated 5 March 2015 for the Hartlepool site contained a specific question (question 53 (a)) asking whether Niramax had ever been the subject of special terms imposed by an insurer. Another signed proposal (dated 12 March 2015, for the Washington site) was in the same terms. Niramax answered those questions in the negative. Both were of course inaccurate. Both proposals were signed by Mr Betts, described as Director on the Hartlepool proposal and Director/Financial on the Washington proposal.

91. Mr Sweeney sent the two proposal forms for Washington and Hartlepool on 12 March 2015 and said that the policy documentation was awaited.

92. Therefore, by mid-March 2015, Niramax had to choose between competing offers of insurance from both Millennium and Aspen. Just prior to the expiry of Millennium's 14 day extension of cover Mr Sweeney instructed Miles Smith to hold covered. Niramax thereby accepted Aspen's offer of cover (rather than Millennium's) and it obtained cover for the 2015/16 year with a line of insurers led by Aspen. Having now received the signed and dated proposal forms, the Aspen schedule and contract of insurance were issued on 25 March 2015.

93. On 30 May 2015 a fire suppression system was installed on the two internal shredders at Thomlinson Road, and this was confirmed by Mr Sweeney to Miles Smith.

94. Thus, Aspen were on risk for the buildings insurance for the 2015/16 year, with the risk due to renew in March 2016.

The AG Policy

95. The AG Policy (policy AG618970) had incepted in 2007 and had been renewed seven times. It was also plant policy, but – importantly in the context of this story - at some point it had become the case that some of that plant (probably less than £1 million in value) was fixed plant. Zurich was not aware of this – because of the way in which mobile plant policies were written at this stage, there was no plant list.

96. The policy fell due for renewal on 15 November each year. On 21 October 2014, Mr Armstrong, an engineering development underwriter at Zurich, e-mailed Mr Sweeney with renewal terms for that policy. The quoted level of cover was £690,000.

97. Again the e-mail noted increases due to the high risk nature of the recycling market, explaining that increases in premium and excess were "*purely down to the trade and experience the engineering market has had with the fire exposure*". This was a point he reiterated when Mr Sweeney tried to get a reduction in the premium. He added that Zurich no longer wrote new business for waste risks.

98. Following the 21 October 2014 email which quoted a premium of £11,500 plus IPT there was discussion of increasing the sums insured to £1m and a higher premium of £16,670 plus IPT. On 14 November 2014, Mr Sweeney e-mailed Mr Armstrong accepting the offer of cover of £1 million.

Renewal of the Policy on 15 December 2014

99. Returning to the Policy, the renewal date for this risk was 15 December 2014. The renewal into the 2015 year was in one sense straightforward. In December 2014 the renewal premium was calculated. This was done by reference to three things: the sums insured, the trade and the claims record. It appears that by this stage there should have been a plant list for any plant worth over £25,000; but in the event this was not sought.

100. The figure calculated was £23,714.40. That was a 20% increase on the premium for the previous year. Renewal terms were offered, which were (after an attempt to get a reduction) accepted. It was also not in issue that this premium was incorrectly calculated. Instead of applying a 6% rate (for waste risks) a rate of 2.25% was used, and then weighted by 40%, which self-evidently left the premium below the level it would have been if 6% had been used.

101. On another level however, there was an issue. One matter of significance was who wrote this risk, because Zurich's case was predicated on the position that the risk was considered by Ms Jones and would have been referred from Ms Jones upwards and eventually to Mr Penny; evidence was called to verify this chain of underwriting, but not an alternative structure.

102. In 2014 the Policy was originally allocated to Mr Michael Smith, a market underwriter of Zurich. The premium was calculated on a ratings sheet bearing his name. Ms Jones' evidence was that the matter had been allocated to her. On its face that evidence is inconsistent with the rating sheet, which indicates that Mr Smith was the one that initially worked on the document and that the case had been allocated to him. The renewal documentation was also sent out in Mr Smith's name. Further, although Ms Jones had authority to deal with renewals of up to £1 million, that did not apply to waste risks.

103. At the same time there is evidence – aside from her own recollection - that Ms Jones did work on the risk, because it is apparent from the documents that someone in Mr Sweeney's office spoke to her. She was requested to reduce the premium which had already been quoted. There is also evidence to show that Ms Jones referred the request to a more senior underwriter, Mr Trinham, who refused the request, because of the high-risk nature of the trade. That refusal was conveyed to the person in Mr Sweeney's office who made a note of the conversation.

104. In the light of the evidence given, I conclude that Ms Jones was indeed the person who was involved on the ground with this risk. Ms Jones was being trained at the time of the renewal. She would work on risks which would otherwise go to more senior underwriters if they were allocated to her. Mr Smith was senior to Ms Jones. The fact that he was named on the rating sheet is not necessarily significant, since he was previously involved with the risk, and the sheet is "pre-populated" by a back office executive. Similarly, the renewal correspondence would be expected to correspond with the rating sheet, as it is also prepared by the back office, from that sheet.

105. What is more significant is that we can be sure that Ms Jones had the conversation with Mr Sweeney's office – the contrary was not suggested. Further we can see from the internal documentation that she did raise the query about the rating with Mr Trinham and he responded direct to her. If Mr Smith had been in charge of the risk, one would expect either or both of these exchanges to feature him – even if Ms Jones was assisting him. Yet he is not evidenced as involved with the discussion at all.

106. I therefore conclude that Ms Jones, supervised by Mr Trinham, underwrote the renewal of the risk in December 2014.

The addition of the Eggersmann plant

107. In mid-2015 Niramax was grappling with the insurance consequences of the imminent arrival of the Eggersmann plant, which by itself was worth a sum which roughly equalled the level of cover on the buildings policy. The Eggersmann was plant, but it was not mobile plant or hired-in plant. It was fixed plant, to be installed in its premises.

108. Mr Sweeney appears to have contacted Zurich rather than Aspen. The reasons for this were not the subject of evidence, though it appears that he later told Zurich that "*he has had issues with [Aspen] and does not have confidence in them*". In any event Zurich was requested to add the Eggersmann plant to the Policy – which was a mobile plant policy - in August 2015.

109. Mr Smith was the first person to whom the query came. He considered it to be "*not really suitable for this policy. We would only look to cover mobile plant under the Owned Plant definition.*" He suggested that it should be covered under Niramax's property policy; accordingly, in the first instance cover was declined by Zurich.

110. It appears that Mr Sweeney was unwilling to take no for an answer. He spoke to Mr Alan Edge, who referred him to the Leeds office of Zurich. He also noted in internal emails that it was (according to Mr Sweeney) a good risk, and that the AG Policy had approximately £2.5 million of similar plant already on it.

111. Mr Long, to whom this was referred by Mr Edge, came back along similar lines to Mr Smith, saying this was a property risk – and that if there was similar cover on another policy that was wrong and should be dealt with on the renewal of that policy (due in November of that year). Mr Long noted: "*If we were to add the static plant…and this location burned down, we would be asked a number of questions as to why we were covering this…*".

112. Mr Long, it should be added, is the same Mr Long who wrote the 2006 policy. However, by now his career had progressed and he was a senior underwriter, Mr Penny's number two, with the same level of underwriting authority as Mr Penny, though he was in business terms a level below Mr Penny.

113. Mr Armstrong was the Zurich engineering underwriter who subsequently dealt with Mr Sweeney. His role was more client facing and it appears that he may have been brought in to manage Niramax's disappointment or because of his involvement with the AG policy. However, Mr Sweeney was ready to sell Niramax's position to him. Mr Sweeney pressed for Zurich to provide the cover for the Eggersmann under the Policy. This was consistent with his strategy, described to Niramax in his email of 17 December 2014, where he said:

> "… Therefore we are paving the way with the engineering policies to cover all of the plant, traders, conveyor belts, IDF, et cetera under separate engineering policies so then in relation to the material damage we will only need to consider the prospect of buildings only."

114. Obviously impressed by the case made, but aware of the reluctance which had been expressed by Mr Smith and Mr Long, Mr Armstrong referred Niramax's request to another senior underwriter, Mr Ian Hutchinson. Mr Hutchinson was the Team Manager for Zurich Engineering in Leeds. He was also the Engineering Underwriting Governance Manager, which meant that he was responsible for engineering underwriting standards and governance for the whole of the UK. He was however one level junior, in underwriting terms, to Mr Penny and Mr Long.

115. Mr Hutchinson's view, after consultation with Mr Long, and expressed in a detailed email of 4 December 2015, was broadly similar to Mr Long's, but with a different result. He agreed that it was really a property risk which should not be on this sort of policy. Mr Hutchinson recognised that Zurich also insured fixed plant of Niramax at Tofts Farm, under the AG Policy, and that the Eggersmann was not significantly different to the fixed machinery under that policy. His view was that the Tofts Farm plant should not be covered either. However, he acknowledged the issue, in that Zurich was currently (until later in the year) on risk for this analogous plant.

116. In the end – and it is plain from reading his email that he did not consider this an easy decision - he considered Zurich was effectively duty-bound to Niramax to at least cover the Eggersmann plant until the policy renewal (as he thought in November, but in fact in December 2015). The way he put it was this:

> "I can see that its brand new equipment and has fire suppression … it gives me some comfort that there is no imminent danger that the equipment will fail or burn to the ground.
>
> My feeling is that as we have already accepted this risk for a 12 month period and the equipment that they are adding to the schedule is not significantly different to that they already operate, we are morally bound to accept this additional equipment up to renewal date."

117. That was reflected in his oral evidence: *"I felt that I needed to come up with a solution that was treating the customer fairly, take that to David Long and say, 'Is this fair to the customer'?"*.

118. Even on this reluctant basis he was keen to safeguard Zurich as much as possible. He required an increase to the excess from £500 to a minimum of £10,000 and a "*trouble free running in period*" for the Eggersmann of 30 days (which reduced the risk arising from the machine itself almost to vanishing point), as well as other conditions which had nothing to do with the Eggersmann risks. The premium charged was significant: £32,782.62. He was also emphatic that "*Broker should be given notice now that we are not likely to offer renewal terms … our underwriting opinion is that this is actually a commercial property risk.*"

119. With a prescience which was lost on nobody present at the trial, he added:

> "I can see from the website that this is probably a pretty clean business of its type and in another world we might consider

> renewal, but ultimately this is a Property risk and the cleanliness/loss experience is not a consideration for us and as with everything in this trade, if they haven't had a claim yet, it is just waiting to happen."

120. The fire occurred before renewal in December 2015. On renewal Zurich declined to cover Niramax's fixed plant.

Later events

121. Niramax have understandably sought to make much of the fact that Zurich's reaction to the claim was to scrutinise it very closely. However, in my judgment this reaction was in the circumstances hardly surprising; and it is in any event not a matter which is germane to the issues before me.

122. Nor am I at all persuaded that I should give any weight to what Niramax called "*the insignificance of the grounds originally relied on by Zurich*". What matters is the essential validity or otherwise of the grounds ultimately relied on; though I shall come back to the related submission that the grounds relied on suggest that Zurich set the bar for inducement too low.

123. What is (unusually) germane is some of the procedural history. By November 2017, with no decision from Zurich on whether to pay or avoid, Niramax commenced proceedings.

124. Predictably Zurich's reaction was to avoid the Policy. The case as then advanced bore little relation to that which I heard.

125. Zurich contended that Niramax had failed to disclose 5 material circumstances. Of those 5 circumstances, 4 were discrete matters based on publicly available information which did broadly continue to be part of the case to trial. They were:

    i) A conviction of Niramax in 2006, 9 years before the fire, for which it received a fine of £10,000 ("the 2006 Fine Defence");

    ii) A conviction in 2009 of a former director of Niramax (namely Malcolm Dean) for which he received a fine of just £250 ("the Dean Fine Defence");

    iii) Receipt by Niramax of HSE notices in 2009 ("the HSE Notices Defence");

    iv) A fire at a separate site in 2012 ("the 2012 Fire Defence").

126. The fifth circumstance was however the key. It related to Mr Shaun Morfitt ("the Morfitt Defence") and it was one of the issues that Zurich had raised in pre-action correspondence.

127. Mr Morfitt was interested in a company called Morfitt Waste Management Ltd ("MWM"). Niramax engaged in a significant amount of trade with MWM. In addition, Mr Morfitt was considered to have a connection to Mr Neil Elliott; a connection whose details need not be given here, but which was said to be so close that Zurich considered that Mr Morfitt should be considered a "shadow director" of Niramax.

128. The reason why Mr Morfitt was significant was (as noted above) that in May 2010 he had unlawfully and maliciously wounded another person with a machete and had been imprisoned for 6 years and 3 months.

129. On this basis, Zurich contended, Mr Morfitt's commission of and conviction for that offence should have been disclosed by Niramax to Zurich because they were material to the moral hazard that Niramax would pose as an insured. It was common ground that if Mr Morfitt could have been established to be a shadow director of Niramax, this argument would have been a strong one.

130. In addition to asserting that it was entitled to avoid the Policy for non-disclosure, Zurich also asserted that Niramax was in breach of conditions precedent in the Policy ("the Breach of Condition Defence").

131. Between July 2019 and October 2019 the shape of the case changed very considerably. Defences relating to Millennium's renewal terms and the Aspen placement plus a case in misrepresentation arising out of a statement by Mr Sweeney were added; and the Morfitt Defence and Breach of Conditions Defence were dropped. The former occurred because of materials which had emerged during the course of the litigation. The latter, rather the reverse. It was apparent that following a review of the materials Zurich were advised that the evidence did not sustain the allegation that Mr Morfitt was a shadow director. While at least some of the Zurich team disagreed with this assessment of the evidence, they rightly followed that advice.

132. As a result, the basis of avoidance before me was very nearly a completely different beast to that which it had been at the time of avoidance.

The Law

133. The law relevant to this claim barely requires to be stated.

i) Pursuant to section 18 of the Marine Insurance Act 1908 an assured must "*disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known to him.*"

ii) A fact is material if it "*would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk*".

iii) "*Whether a circumstance is material or not is a question of fact to be determined in each case. The decision rests on the court's own appraisal of the relevance of the disputed fact to the subject-matter of insurance. It is not something which is settled automatically by current practice or the opinion of insurers. The court makes its own evaluation.*" Carr J. in *Brit UW Ltd v F & B Trenchless Solutions Ltd* [2016] Lloyd's Rep IR 69 at [102] and to similar effect Leggatt J in *Involnert Management v Aprilgrange Ltd* [2015] 2 Lloyd's Rep 289 at [98] noting that expert evidence will generally be "*helpful and important to ensure that the court's findings are grounded in commercial reality*". It is an objective, and not a subjective question. The Court decides, as Leggatt J put it, "*whether or not it is rational to take a particular matter into account*".

iv) An insurer can only avoid the contract if he was induced by the representation or non-disclosure to write the precise contract which was written – including as to its terms: see *Synergy Health (UK) Ltd v CGU Insurance Plc (t/a Norwich Union)* [2011] Lloyd's Rep. I.R. 500 per Flaux J at [185]. Clarke LJ put it thus in *Assicurazioni Generali SpA v Arab Insurance Group* [2003] 2 CLC 242 [62]:

> "In order to prove inducement the insurer or reinsurer must show that the non-disclosure or misrepresentation was an effective cause of his entering into the contract on the terms on which he did. He must therefore show at least that, but for the relevant non-disclosure or misrepresentation, he would not have entered into the contract on those terms. On the other hand, he does not have to show that it was the sole effective cause of his doing so."

v) As to the burden of proof, it is common ground that the burden is on Zurich to prove its case.

134. Finally, while it has been said (for example by Rix LJ in *Wise v Grupo Nacional Provincial SA* [2004] 2 Lloyd's Rep 483 at [99]) that the burden of proving inducement is not a heavy one, caution must still be exercised, essentially for two reasons. The first is that avoidance is a draconian remedy which should not be lightly granted, as Staughton LJ noted in *Kausar v Eagle Star* [2000] Lloyd's Rep IR 154 at pp. 157-158. The second is the danger of perfectly genuine evidence on inducement being affected by the perspective offered by hindsight and party interest and (to a greater or lesser extent) by being a hypothetical construct. This is a point noted in a number of the authorities, including the *Synergy* case, and one to which I will revert below.

The Issues

135. At trial therefore Zurich sought to avoid the Policy for Niramax's failure to disclose material facts and/or misrepresentation of material facts (a) at renewal in December 2014 and/or (b) at the mid-term adjustment in September 2015 to add the Eggersmann plant.

136. The central plank of this case, as advanced at trial, related to non-disclosures to Zurich in December 2014 and September 2015 of:

i) Niramax's failure to comply with the Millennium risk requirements imposed in February 2014.

ii) The Millennium special terms imposed in October 2014 (and in force when the Policy renewed) requiring 35% self-insurance and a minimum contribution of £250,000.

I shall refer to these defences, which were really one composite issue, as "Non-disclosure of non-compliance with Risk Requirements and the Special terms".

137. In addition, as at September 2015 reliance is placed on non-disclosure and/or misrepresentation to Aspen in January and March 2015 of the Millennium renewal terms ("The Millennium Renewal Terms Defence") and the non-disclosure to Zurich of the failure to tell Aspen ("the Aspen Defence").

138. Also relied on (originally relied on both independently and together with each other and the above, but in closing only "taken in combination") were the following non-disclosures at renewal in December 2014:

   i) The Sweeney Misrepresentation Defence: Non-disclosure to Zurich of Mr Sweeney's false assertion to Miles Smith, London in January 2014 that the risk had *"surveyed very well"*. This was said to be contrary to the then most recent surveys of Niramax' premises (in January 2013 and March 2013 undertaken for Aviva) which had revealed breaches of insurance policy conditions/warranties and a very high exposure to the risk of arson and had imposed a range of risk improvements which Niramax had failed to comply with at all.

   ii) The 2012 Fire Defence: Non-disclosure in December 2014 of a fire in November 2012, at a property owned by Seneca (a Neil Elliott company) but which Niramax was using for its tyre crumb operation.

   iii) The 2006 Fine Defence: Non-disclosure of convictions of Niramax in 2006 for illegally stockpiling around 128,000 tyres between August 2005 and March 2006 without a licence and for failing to remove the tyres following receipt of a notice requiring Niramax to do so. There were four offences of keeping or controlled waste without a licence and a total fine of £10,000.

   iv) The Dean Conviction Defence: Non-disclosure of a conviction dated June 2009, of Mr Dean for unlawfully depositing controlled waste between July 2007 and January 2008.

   v) Non-disclosure of Niramax's breach of duty for failing to disclose material facts on earlier renewals or occasions when the material facts should have been disclosed.

139. I will deal first with the central question: the Non-compliance with Risk Requirements and the Special Terms.

140. I deal with these separately from the related issues of (i) the Millennium Renewal Terms Defence and (ii) the Aspen Defence because they apply to both December 2014 and September 2015 dates and because there was an issue about whether Niramax (as opposed to Mr Sweeney) knew of the relevant facts for these latter two defences.

Non-disclosure of the non-compliance with Risk Requirements and the Special Terms

141. I will deal first with the question of "active engagement", it being Niramax's case that the facts were not material because there was (in essence) no real culpable failure to comply. I will not rehearse the facts which I have found above. It is sufficient to say that I conclude that despite the lack of clarity which seems to have existed about the fire suppression systems, Niramax did delay in complying with the risk requirements, and did demonstrate a somewhat lackadaisical approach to responding to what were plainly serious concerns on the party of their property underwriters.

142. Having read the correspondence and heard the witness evidence on this I am persuaded that while there was a lack of clarity about the fire suppression system (in particular what exactly was required) that lack of clarity did not extend to other risk requirements

(such as CCTV). Yet a number of those requirements were, as noted above, not promptly complied with.

143. As regards the fire suppression system, Niramax did not ask for clarification, but instead indicated (inaccurately) that it was taking steps to comply. I do not consider that this was done with any malign intent; rather Niramax intended to comply, was unsure what to do and let things drift. But the net result was that Niramax did not comply within the policy period and did not really attempt to comply for some months.

144. There is a still more unimpressive period over summer 2014 when either Mr Sweeney was lying to Millennium, in telling them that the risk improvements were done or (and I regard this as more likely) Mr Betts, with no real knowledge was making positive noises about progress to Mr Sweeney, who then "*counted as done that which ought to be done*" in the way he put the matter to insurers. But on either analysis Niramax were being chased on this, and were doing nothing in practice – despite obvious concern from insurers, and despite Mr Antropik at least being aware that a failure to comply could lead to negative results (in terms of loss of cover or increase in premium).

145. Then in autumn 2014 there is very little sign of activity from Niramax, even in the face of repeated chasing from Millennium – and repeated, and increasingly emphatic chasing from Mr Sweeney. There was in reality no good reason why the risk requirements could not have been complied with well before Millennium was driven to imposing special terms. One example is that Niramax was specifically pointed to Fireward in early September, but seemed not to have contacted them at all before the special terms were imposed a good month and a half later. Given that Fireward quoted within two weeks of being contacted and could have installed within three weeks from the order, that indicates that this most troublesome aspect was well capable of having been dealt with in good time.

146. The impression given, particularly in the light of (i) the decision not to seek to renew cover for the Washington site because of the cost of compliance with the risk requirements and (ii) the "trailing" of the Fireward quote by Niramax in the context of Mr Sweeney's valiant attempts to get the risk requirements and special conditions dropped, is that Niramax were unwilling to spend the money involved in the risk requirements, and that unwillingness led to a state of drift.

147. In these circumstances I reject the submission, skilfully advanced though it was, that Niramax was actively engaged in compliance, and that therefore (to the extent that a failure to comply would otherwise be material) the failure to comply and special conditions were not material.

Materiality

148. On this issue the experts were close to being agreed that a failure to comply with risk requirements was material.

149. They agreed in the Joint Statement that the terms imposed by Millennium in October 2014 would be considered special terms. Mr Coates' opinion was that a prudent underwriter always wants to know about special terms imposed by previous insurers and says that proposal forms or statements of fact invariably include a specific question about special terms; as with the Aspen proposal form. Mr McIlduff's view was more

nuanced, since it was his view that "active engagement" would have prevented a conclusion of materiality. But he tacitly agreed that absent such engagement, an imposition of special terms would be material.

150. Mr Coates also opined that Niramax's failure to implement Millennium's risk requirements was material to be disclosed because failure to comply with Millennium's risk requirements and Millennium's consequent imposition of special terms were both relevant to Niramax's attitude to risk management especially in a sector viewed by insurers as a high hazard. Again, Mr McIlduff's view on this seemed to be to accept this, absent the rider of "active engagement".

151. Mr McIlduff was cross-examined on the basis that his approach conflated materiality with inducement. I am not entirely persuaded that this was necessarily the case; that analysis may depend upon the approach one takes to the concept of materiality. There remains an interesting debate about whether materiality does, or does not, hinge on the relevance of the fact to the risk to be insured. That debate, (materiality to the risk or materiality to inducement) was examined in *Pan Atlantic v Pine Top* and (as the learned authors of *Good Faith and Insurance Contracts* (MacDonald Eggers and Picken) note in Chapter 14 of that book) has never been satisfactorily resolved, with distinguished proponents on either side.

152. So, on the one side, materiality to inducement was advocated by *inter alia* Mr Anthony Colman, QC in *Sharp v Sphere Drake Insurance plc; The Moonacre* [1992] 2 Lloyd's Rep 50: "*Given the width of the general principle of the utmost good faith, there can be no justification for confining material circumstances to those which are directly relevant to the assessment of the risk.*"

153. On the other side lies Hoffman LJ in *Société Anonyme d'Intermédiaires Luxembourgeois v Farex* [1995] LRLR 116 (supported by MacDonald Eggers and Picken) indicating that "*The duty of disclosure is founded upon the likelihood that matters affecting the insurer's likely liability under the contract (including arrangements which may affect rights of subrogation) will be within the peculiar knowledge of the insured*".

154. I mention this debate not because it is pertinent to the outcome of this issue, but because it is to an extent pertinent to my conclusions on materiality of some of the other heads relied upon by Zurich, and sometimes to the different approaches taken by the two expert underwriters.

155. Thus, as to special terms, questions were put on the basis that the imposition of special terms is universally material. That is an approach which is not necessarily related to risk; while special terms will often (probably nearly always) be imposed for a reason which relates to the risk, in some case they may be imposed for a different reason. Therefore, to peg materiality to the imposition of special terms *per se* divorces the concept from risk; in essence it aligns with the approach of Mr Colman QC. Mr McIlduff, in focussing on "active engagement", and the position in the event that had existed, was arguably here focussing on materiality to the risk, because that was contextual.

156. However, while it was in the end apparent (in the context of other aspects of the case) that both experts themselves took the view that materiality was a wider concept than

matters relevant to risk, here their ultimate agreement on this point was based on a view that failure to comply with risk requirements, and the imposition of these special terms, in these circumstances, was material because absent "active engagement" it manifested an attitude to compliance which was relevant to the risk.

157. So, Mr McIlduff took the view that if there was "active engagement" that impacted on the risk, and hence on materiality. But he agreed that if there were no such engagement, the failure to deal with the risk requirements, and the imposition of special terms, were material.

158. Further, viewed from my own perspective, that conclusion makes perfect sense. Risk management, which is what compliance with these terms was about, must logically be relevant to risk. As Mr McIlduff put it, the failure to comply with another insurer's requirements is a grave concern because it speaks of poor housekeeping; and "*good housekeeping is terribly important because it leads to a higher risk if it is not"*. Mr Coates' view was similar: the delay in compliance with the risk requirements went to *"the heart of the management of the risk"*.

159. I therefore accept the evidence of the experts that this composite issue was material.

Inducement - introduction

160. This then leaves the question of inducement. This has been, on the evidence before me, a less than straightforward issue. Ironically this is in large part because it was clear, both from what actually happened in terms of the writing of the extension of the risk to cover the Eggersmann plant, and from the evidence of Zurich's witnesses, in particular Mr Penny, that Zurich was prepared to step outside the answer which might be provided by a slavish following of a risk matrix, in order to maintain a relationship with a long term client.

161. In particular, I have been troubled by three aspects of the evidence. The first was Mr Hutchinson's "morally obliged" decision. On the facts he was quite clear that the analytically correct answer to this underwriting proposition was in the negative; but the facts arising out of the relationship, and a mistake in the client's favour on another risk, meant that he felt it would be wrong to take the analytically correct approach.

162. The second was that while Mr Penny's evidence was that Mr Hutchinson had been wrong to take that decision, in his evidence it was clear that his own mindset was actually very closely aligned with this. In particular there was this passage of evidence, given in relation to renewals as at 2014:

> "Q. So, you explained that there was a change in strategy to not write new waste risks because they were not making money because of fires. Was a different approach adopted to: renewals of existing business?
> A. We do not like kicking business out, to be honest. If we have had business a long time, we will rather have a look at it first and give it every opportunity before we decide what we are going to do with it.… Some we offered renewals terms on that they did not find acceptable. There were a handful that we

> just did not renew, because we looked at them and just could not find a way of underwriting it sensibly.
> Q. Why do you not like kicking business out?
> A. Because there is a certain amount of loyalty to clients and it is not, I would say it is not a very Zurich thing to do. Actually refusing somebody insurance is not something I particularly want to do, because there are implications to that. So I would rather find a way of underwriting it, if we can."

163. The third aspect related to the contaminating effect of the Morfitt allegations on the witnesses' evidence on inducement. I have outlined the position on the Morfitt allegations above. The point was, if soundly based on the facts, a good avoidance point. The facts are, to put it mildly, striking, and have an obvious relevance to risk. It was in Zurich's mind when the decision to avoid was taken. And Mr Penny frankly acknowledged two things. The first was that he still subjectively thought the point good; his own view is that Mr Morfitt was a shadow director, there was just a difficulty with establishing that he was a controlling mind of the business. Effectively Zurich withdrew the point on advice, not from conviction. The second was that it was inevitably hard, having taken the decision to avoid against the background of that allegation, to "doublethink" the question now on the basis that the point had never existed.

164. The case of *Gestmin v Credit Suisse* [2013] EWHC 3560 (Comm) (anomalously still unreported) is often cited, and I have in another judgment ([2018] EWHC 2918 (Comm) at [13-14]) previously emphasised the ways in which the litigation process itself can "overwrite" witnesses' memories so that the evidence they give, even in the best of good faith, can become questionable.

165. This point, as regards the existence and disappearance of the Morfitt allegations is a striking, though perhaps unusual, example of a situation where this problem requires to be carefully considered.

166. Also very much on point in this insurance context is the characteristically wise judgment of Colman J in *North Star Shipping v Sphere Drake Insurance* [2005] 2 Lloyd's Rep 76, highlighting the caution needed in all cases where inducement is an issue:

> "In evaluating the underwriters' evidence it is important to keep firmly in mind that all their evidence is necessarily hypothetical and that hypothetical evidence by its very nature lends itself to exaggeration and embellishment in the interests of the party on whose behalf it is given. It is very easy for an underwriter to convince himself that he would have declined a risk or imposed special terms if given certain information. For this reason, such evidence has to be rigorously tested by reference to logical self-consistency, and to such independent evidence as may be available."

167. This was a point which Mr Penny frankly acknowledged, saying: *"I think whenever you uncover facts that you are not told, that you did not know about at the time you*

underwrote the risk, it is always going to be speculation as to what you would have done had you been told about those facts at the time." Here of course, as Niramax pointed out, the context is particularly acute in that this risk resulted in an exceptional £5 million loss.

168. A related point raised by Niramax, and which I have had much in mind also, is the question of whether I should treat the Zurich witnesses' answers on inducement with caution because there is evidence that they set the inducement bar too low. The point is that Zurich originally relied on certain HSE Prohibition notices as a defence to the claim and only abandoned that defence when Zurich's expert would not support the case on materiality. Niramax submits that this demonstrates that Zurich's underwriters have set the bar unrealistically low when trying to consider with hindsight what they would have done.

169. This is an argument which may well have force in some cases. I am not however persuaded that this is one of them. As previously noted, the reliance on the HSE Notices was part of a portfolio of reasons, including, crucially, the Morfitt defence. On examination it became apparent (as will be explained below) that a number of these defences, not just the HSE defence, were ones which they would not have taken in isolation. The readiness to take a sensible approach to these other points when looked at as independent issues, and the context in which the reliance on them was originally considered, takes much of the sting out of this point.

170. The question effectively resolves itself into this dilemma: can I accept the evidence of the Zurich witnesses that they would have referred the matter to Mr Penny and he would not have underwritten the risk, or is the more likely conclusion, given the evidence on these aspects, that even if the risk had been referred to Mr Penny with this extra piece of information, he would have *"done the decent thing"*, and offered cover to tide a good client over until renewal, just as Mr Hutchinson did?

171. I should perhaps deal first with two questions which were both a focus of considerable cross-examination. The first is the question of whether this risk would probably have found its way to Mr Penny, or to someone else. The second is the question of what should be taken to be the extra information which that person would have been given.

Inducement: Identity of underwriter

172. It was Niramax's case that as at December 2014 (i) the risk was not underwritten by Ms Jones (ii) if it was she would not have referred it to Mr Trinham but to Mr Long (iii) if it had been referred to Mr Trinham he would have referred it to Mr Long.

173. Zurich for its part contended that the ultimate underwriting decisions as to whether to offer renewal to Niramax in December 2014 and whether to agree the addition of the Eggersmann plant to the Policy in September 2015 and, if so, on what terms in either case would have been referred up the chain of authority to Mr Penny if the material facts which Niramax failed to disclose had been disclosed.

174. As noted above, I am satisfied that the renewal of the risk in December 2014 was underwritten by Ms Jones, supervised by Mr Trinham. I am also persuaded that Ms Jones would have referred the risk to Mr Trinham if she had been told of the failure to comply with the risk requirements and/or the special conditions. Although it was argued

that she would have referred to Mr Smith or Mr Long that would make no sense when she did in fact consult Mr Trinham when there was a query – and Mr Smith was not very much senior to her. Ms Jones would not in my judgment have referred directly to Mr Penny or Mr Long, who were some distance senior to her.

175. The more contentious point was what Mr Trinham would have done. It seems clear that he would have referred the matter onwards; he appeared in his evidence to be a cautious person who would not simply have carried on without referring these facts upward. So far as this issue is concerned I accept that Mr Trinham would have referred the matter on to Mr Penny, rather than to Mr Long. Although he might have referred a risk to Mr Long in earlier years, when Mr Long was in the same room as him, that would not generally have been the case later, when Mr Long had moved on, or when the question was more complex, though he might have referred a query on the background to the policy to him, as the person who had underwritten it originally.

176. Mr Trinham's evidence, viewed overall (both at the time of hearing it and on re-reading), was clear. It was his evidence that he had: "*always referred various queries to Mr Penny*". Mr Long, the alternative person who might have been consulted, was a construction specialist and would not, on Mr Trinham's evidence, have been his choice for a sounding board on the kinds of matters which were in issue here.

177. As for the September extension, the issue related to whether Mr Armstrong would have referred the risk to Mr Long (not called) rather than Mr Hutchinson (who was called). Despite the evidence that Mr Long was involved in the consideration of the risk, and that Mr Armstrong agreed that Mr Long would have been a "*natural port of call*" with whom to raise "*some further information about Niramax*", I accept Zurich's case that Mr Armstrong would have referred the risk to Mr Hutchinson, who was his manager, and the person with whom he had the longer standing working relationship. Further here the case advanced is replicated in what actually happened – Mr Armstrong did seek Mr Hutchinson's guidance on this risk, and it was thus that the risk was eventually underwritten. Indeed, Niramax did not press the case that Mr Armstrong would have referred the matter to anyone other than Mr Hutchinson.

178. From there the question is to whom, if anyone, would Mr Hutchinson have referred the risk?

179. The argument that Mr Hutchinson would have dealt with the risk himself was not credible, in circumstances where the risk without the complicating factor of this extra feature was in fact discussed with Mr Long.

180. I was not persuaded that the holistic factor of referring the risk back to Mr Long because he had underwritten it in 2006 had any force. It seems unlikely that anyone outside this litigation would have tracked this back, and by this stage the underwriting was very far distant.

181. More attractive was the point that Mr Hutchinson did in fact refer to Mr Long and that in 2013 he had stated that all recycling risks be referred to himself, to Mr Armstrong or to Mr Long. However, the actual referral to Mr Long was because of the previous declinature by Mr Long, and in this hypothesis the risk has been further complicated by the critical facts (risk requirements/special conditions). The situation is not a like for like comparison.

182. Despite some clever arguments to the contrary, Mr Hutchinson's evidence was clear: he would not have made the underwriting decision himself, and he would have referred it to Mr Penny, who was after all the senior man. This risk had more than one layer of complication. It was Mr Hutchinson's evidence (which chimed with that of Mr Trinham) that if he considered a matter very unusual or out of the norm he would discuss it with Mr Penny, especially if it related to a waste risk. He also said that he would not have been comfortable not letting Mr Penny know what he was doing. Having had the benefit of the evidence of both individuals, that evidence rang very true.

183. Mr Hutchinson was (on this hypothesis) being asked to stick his neck out considerably. I accept the evidence that he would have referred this risk to the man at the top – Mr Penny.

184. I note in passing that as regards the September extension there is a rich irony to Niramax's case that the referral would have been to Mr Long (because Mr Long has not been called to give evidence on inducement), given the fact that even absent the facts in focus here, Mr Long's reaction to the request was to give it short shrift.

185. These conclusions deal with the submission on *Wisniewski*. The point as to adverse inferences only arises if there were witnesses who might be expected to have material evidence to give. In the circumstances, while a more complete picture in some respects would probably have emerged if they had been called, their evidence was not material to the issues for decision, and it would not be appropriate to draw adverse inferences from their absence.

186. This also effectively deals with the (in any event unconvincing) submission that individual bonuses might have played a part in the question of inducement; Mr Penny's level in the hierarchy would make this factor an irrelevancy, and indeed he was not cross-examined on this point.

187. Finally, I should note that this conclusion effectively takes out of account the submission made regarding Zurich's own negligence in dealing with this risk. Niramax urged me to exercise caution in considering the submission as to what the Zurich underwriters would have done because on the facts they had on numerous occasions not acted as Zurich would have expected them to do – failing to raise queries when they should, mis-rating the risk and so forth.

188. I should have been somewhat hesitant about accepting this submission in any event, because it seemed to me that the mistakes relied on were not at all *sui generis* with the decision in question. However, none of these mistakes were those of Mr Penny. Just because others had made slip ups cannot be any basis for concluding, or feeding into the consideration of his (hypothetical) underwriting process, that he would not have proceeded competently or by the book.

Inducement: The extra information

189. Niramax argued forcefully that the question of inducement had to be considered against the full portfolio of information. If the risk requirements and special conditions had to be disclosed, so too did Niramax's reasons for failing to comply. So too did a host of positive features, in respect of both security and fire, as set out in the survey carried out on behalf of Aspen in January 2015.

190. These included:

    i) A security guard who patrolled on an hourly basis;

    ii) A CCTV system with internal and external cameras;

    iii) A fire risk assessment had been undertaken by a health and safety consultant;

    iv) Niramax employed a third party contractor to provide guidance on fire protection if required;

    v) 21 small bore hose reels positioned throughout the site as per the fire risk assessment;

    vi) Fire extinguishers throughout the site and in close proximity to all plant and machinery;

    vii) The site was connected to the town's water mains and 1,000 litre water barrels were held;

    viii) Niramax owned and operated a working fire engine;

    ix) The fire station was 0.5 miles from the site with a response time of 5-10 minutes;

    x) The fire extinguishers were serviced and maintained under contract.

191. This is a valid point. I agree that if the special conditions and risk requirements were material it was open to Niramax to rely on these factors, and Niramax would have disclosed these matters. But while these are broadly positive features, they do not really address the specific concern which is raised by the Risk Requirements and Special Conditions issue. It was Mr Penny's evidence, which I accept, that some of these features would be expected in any event. I conclude that even with a presentation of up-side along with the facts of the risk requirements and special conditions the materiality of the information was not significantly affected.

192. I would add that so also is it the case that, as Zurich contended, on this basis Zurich are being assumed to be effectively being given a full underwriting assessment and this would probably have brought into play some less attractive features, such as the repeated queries raised in surveys from 2011 about poor practices on the part of Niramax in storing excessive quantities of combustible materials. In particular, some of the positive features relied upon were in reports which themselves made this point. Niramax in making their hypothetical fuller presentation could not "cherry pick" these surveys.

193. The result is that while a fuller picture would be expected to be presented, the additional factors do not add much; the overall picture relevant for the purposes of materiality does not significantly differ from the addition of the specific facts of the risk requirements not being promptly dealt with and the special conditions imposed.

194. Before closing on this point a further argument should be dealt with – that is Niramax's contention (which might be regarded as one relevant to materiality or inducement) that the way in which the risk was written and renewed – in particular the absence of detailed

questioning and the formulaic approach to underwriting, as well as the evidence that the premium did not justify a full "bells and whistles" underwriting job, meant that these matters were not material to a prudent underwriter of this kind of risk (or that they would not have affected the judgment of the relevant underwriters here).

195. As Niramax put it, "*there was no interest on the part of Zurich as to any particular feature of the risk to be insured, save for the trade, the sums insured and hire charges, in order to calculate the premium*". Niramax also contended that the existence of buildings insurance was effectively happenstance, its absence could not have been complained of, and that in those circumstances it was illogical to bring the situation regarding the writing of that risk into account.

196. This is an argument which does not really apply to the September Extension – because it is plain that this was a bespoke exercise, dealing with a risk which was acknowledged to be outside the usual run of risks.

197. However, nor in my judgment is it a good point even as regards the renewal into 2015. The difficulty is that Zurich underwrote what one might term "vanilla" mobile plant risks and renewals in this way; that does not mean that less straightforward risks would be reviewed in the same way. Indeed, the evidence was that they would be escalated for more detailed consideration. There was also a sense that this streamlined process was tacitly piggybacking or assuming a more thorough underwriting risk review which was taking place for the more significant insurances (say the buildings insurance) in the various places where mobile plant might be used. The evidence was, for example, that buildings insurance would involve obtaining significant amounts of information, and would usually involve a survey.

198. Thus Mr Coates said in his evidence that a property insurer and an insurer of contractors' plant are equally exposed to some of the same perils such as fire so if things were "going wrong" springing from the property insurance then those are matters which would be material for the contractors' plant insurer to consider.

199. In this skeletal underwriting process for mobile plant, it was in essence being taken as a given that the business's risk was tolerably well managed (because other covers were being obtained), with trade and the risk record being the only aspects of risk which specifically required to be considered. Of course, it might be that in isolated cases buildings insurance did not exist and there was no-one satisfying themselves as to the company's risk-management. But that would hardly be usual; and I am not persuaded that its absence would be of no significance, given the obligation of making proper disclosure of material circumstances and given the position of the experts on materiality.

200. However on the hypothesis under which we now operate there were facts not being taken into account by the underwriter of the buildings policy which were relevant to risk, and those were also material to a prudent mobile plant underwriter, and those facts were now being disclosed. The underwriting process would thus not have been the formulaic process for "vanilla" risks.

Inducement and Mr Penny

201. This brings us back to the critical question of what Mr Penny would have done. I have weighed Mr Penny's evidence very critically in the light of the concerns which I have expressed above. In the end I have concluded that it is more likely than not that if he had been aware of the facts in question Mr Penny would have reluctantly offered renewal terms in December 2014 but would have refused the extension to cover the Eggersmann plant in September 2015.

202. In considering Mr Penny's position it appears to me be relevant to bear in mind that he was closer to the policymaking level on questions of appetite for recycling risks. His evidence was far more emphatic about the undesirability of recycling risks at this point in the timeline. For example, he said that as far as he was concerned the sentiment changed "*from about 2013 onwards*". That was not quite the flavour of the witnesses lower down the underwriting hierarchy.

203. Mr Penny's evidence reflected the evidence of Mr Coates which was that waste and recycling had very poor loss experience in the decade preceding 2012, with particular difficulties in terms of fires. By this stage most of the mainstream property insurance market (Aviva, RSA, Allianz, AXA) had either stopped exposing themselves to waste risks or viewed it as accommodation business. The recycling and waste management sector was regarded by property underwriters as high hazard.

204. In mid-2013 Mr Penny had indicated to his teams that that there should not be any cover for fixed plant waste risks on an engineering contractors' plant policy. In late 2013 a 10% rate increase was being applied because of the nature of the business. By late 2014 Zurich had effectively shut up shop to new waste risks.

205. It transpired that the full message had not necessarily permeated downwards at the time the renewal was underwritten – draft underwriting guidelines for waste risks were not circulated until Mr Penny reviewed this file after the loss and concluded that the underwriting over the years had been "a mess". However as at 2014 it was expected that senior underwriters would look at all waste risks and would load the premium to reflect the diminishing attractions of waste risks. The effect was that Zurich ended up (whether by kicking risks out or (more often) offering renewal terms that clients did not find acceptable) getting rid of 40% of its existing waste business.

206. So, to commence with the December renewal. On this hypothesis the renewal is referred to Mr Penny. He would at this time have been presented with a great deal more information than was actually presented to Ms Jones. It is "*such disclosure as would ordinarily be made on a fair presentation of the risk ...*" (Flaux J in *Synergy*). He would have been told about the history of the risk (good and bad), including the imposition of the risk requirements and the imposition of the special conditions. He would also have been told that as at 14 December all the Thomlinson Road risk requirements had been met, with the exception of the fire suppression system. And he would doubtless also have had it made clear to him, by Mr Sweeney, that there had been a degree of confusion about what was required.

207. Against this background, would he have refused to underwrite the risk? This is a not entirely easy question. It has largely been presented to me as a binary question: write or not write. On the evidence I have heard and considered I am far from convinced that the real answer is so binary.

208. I am however fairly firmly persuaded that Mr Penny would not have refused to write the risk outright. There remains a question as to what the terms of that underwriting would have been.

209. Certainly the question was not as cut and dried however as the way it was presented in Mr Penny's statements, which did see the matter as one of clear refusal. It seemed clear to me that the full hypothetical was different to the somewhat limited hypothetical which appeared to have been the basis considered at the time when Mr Penny made his statements. In the atmosphere created by the Morfitt allegations this issue was not split out and considered by Mr Penny in this way, and his conclusion that he would not have written the risk at all on this basis therefore fails the *"rigorous testing by reference to logical self-consistency"* test suggested by Colman J.

210. Overall my conclusion is that Mr Penny would have thought long and hard about whether to refuse renewal, but would not have done so against a background where the assured was one of long standing, the story of the risk requirements was troubling but somewhat nuanced and the only outstanding item was one where the information given to the assured had been unclear. This may well have been even more so out of a sense of fair play given that the risk had not been well underwritten for years.

211. What has troubled me is whether, against this background, the premium he imposed would have been higher. I have concluded that it would have been; that is a conclusion which appears to find support in the independent evidence. Mr Penny reviewed this risk after the event. He went on record at the time and confirmed in evidence that the underwriting of this risk over the years had been substandard. Part of this was (based on clear evidence) that the premium calculated for the 2014 renewal did not apply the rate for waste risks correctly; instead of categorising the trade as waste, with an automatic premium of 6%, it was categorised as contractor's portable plant, with a premium of 2.25%, to which a loading of 40% was applied. Further the excess of £500 was very low for a risk of this type.

212. As I have indicated I reach the conclusion on the balance of probabilities that Mr Penny would have offered terms for renewal, impelled to that conclusion by a sense of fair play to a long standing assured and given the less than striking nature of the extra information. However, there were limits to Mr Penny's charity. I conclude that Mr Penny would only have underwritten the risk if it was priced at or about the correct price for the risk. (It seems likely that he might have given a little leeway to ease the transition into proper pricing). This approach dovetails exactly with both the fair approach evidenced by Mr Hutchinson and Mr Penny, and Mr Penny's evidence as to how in fact he approached the process of weeding out less desirable waste risks. One can also see something of the same in the history of the buildings cover; the move to Millennium was against a background of changed underwriting criteria by Aviva and forbidding pricing by Catlin. As such it is a conclusion which derives from independent evidence, and the test of logical self-consistency.

213. As I have said above, this was not quite the case advanced for Zurich; its core case was simple – that Mr Penny would not have written the risk. However, on considering the evidence adduced this more subtle approach seems clearly indicated as the answer.

214. I have included this consideration for completeness, because it forms part of the background to the next question. As I have indicated, the case was essentially put on

the basis of "write or not write?", though a reference to terms was made in passing both in opening and in closing. To this binary question, the answer is "write". Doubtless the reason why the case was not really advanced on the basis of "write or not write/write on different terms" is because it is (in my view correctly) accepted by Zurich that the only change which Mr Penny would have made to the terms is not one which was related to the non-disclosed fact, but one which related to Zurich's earlier errors. It would seem to follow that the non-disclosure would not have been causative of the different terms.

215. Then there is the question of whether Mr Penny would nonetheless have offered the extension.

216. On this question I conclude, despite the curing of the underlying issue by this date, despite the cautions sounded by the hypothetical nature of the exercise, and despite the extra factor of contamination not just by the process, but also by legally irrelevant factors, that he would not. This conclusion may seem counterintuitive, but on a consideration of the material I reach it by a clear margin.

217. By September 2015 the thinking in Zurich had moved further along the timeline of hostility to waste risks. So, the backdrop on this aspect would be no better for Niramax than it was as at December 2014, but rather worse. And at this stage we hypothesise that Mr Penny is presented with a fixed plant risk of considerable size which has no place in the mobile plant policy – as Mr Penny himself had made clear to his team in July 2013 - together with these facts relating to the risk requirements and special terms.

218. The real question here was whether on the evidence I should conclude that Mr Penny would have done something different to Mr Hutchinson. Mr Hutchinson and Mr Penny would both have been weighing the factors in favour of writing the extension (client loyalty, substantial additional premium, terms to manage risk, limited temporal exposure, a potential "cross-selling" opportunity) with the negatives (principally the "wrongness" of the risk for this policy, Zurich's policy against this kind of risk, the considerable increase in exposure – despite the conditions imposed). Mr Penny would also have this extra portfolio of information as to the failure to deal promptly with the risk requirements and the eventual imposition of special conditions, albeit against the full background information and in a world where the requirements had now been met.

219. I conclude that he would have reached a different conclusion with that information to that which Mr Hutchinson reached without it. The starting point is that even from Mr Hutchinson's point of view this was plainly a very marginal decision. Even without the extra information, some other underwriters within Zurich would probably have made a different judgment call. Although Mr Long did not give evidence, it appears that while he ultimately backed Mr Hutchinson, his own initial view had been different.

220. There are then three factors which carry the decision from a very reluctant write to a polite but firm refusal. One would have affected all the senior underwriters. The other two are peculiar to Mr Penny. The first, and of course key, is the small but distinct impact on risk assessment in a high risk industry given by the information which fell to be disclosed. It seems to me likely that this alone would have tilted the balance for any of the possible underwriters (Hutchinson/Long/Penny). This was a significant item. It inflated Zurich's exposure on this risk exponentially. It changed the nature of the policy – as Niramax characterised it in closing: "*the risk being underwritten was effectively*

transformed into one which was predominantly fixed plant, and so would be more appropriately covered by a property policy". It was being underwritten without a survey. Fixed plant was a greater risk than mobile plant due to its lack of mobility. This new information told the underwriters that there were questions over risk management in the recent past. Given the effect of the trouble free running in period, the real risk covered by the extension would be risks external to the machine, which would be affected by risk management. In the context of a knife edge decision, this was enough, particularly when the item being added was not even properly within the policy type.

221. The second factor is Mr Penny's greater sense of the "direction of travel" regarding waste risks. Not only was he more imbued with the developing mindset as to waste risks, he also had the issue of being seen to be consistent with his own guidance of July 2013. He had explicitly said *"no fixed plant on waste risks"*; he would have to break his own rules, which he would naturally be reluctant to do. Here there is no question of the evidence showing (as it did for the other underwriters) that things had been done inconsistently with the rules; Mr Penny was the court of last resort, with no prior involvement in the risk. Unwillingness to write is therefore consistent with the independent evidence, in the shape of those rules.

222. Taking these two factors together, the logically consistent and responsible stance for Mr Penny to take (despite wanting to live up to Zurich's customer service standards) was to turn down the risk, as Mr Long initially did. These two factors against lead me to conclude by some margin that Mr Penny would have refused to add the Eggersmann plant if full disclosure had been made on this topic.

223. But third and finally there is the question of personality and the evaluation of the live evidence. While I have not had the benefit of Mr Long's evidence, I have heard and seen both Mr Hutchinson and Mr Penny. While Mr Penny was never anything other than polite while giving his evidence, it was clear from his evidence (and from the documentary record) that he is a robust personality who is not chary about giving bad feedback where that is appropriate. Mr Hutchinson, though down to earth and knowledgeable, came across as less tough. He was also slightly closer to the client level both in terms of his background – he had been with Zurich since 1979, rising all the way from the rank of administrative assistant - and his operational level. He was more imbued with the difficulty for Mr Armstrong of breaking this news to Mr Sweeney and the client. I would therefore expect there to be a range of decisions where Mr Hutchinson might agree to accommodate the client where Mr Penny would not. This itself dovetails with the factor noted above, that Mr Penny's position was one which involved him making decisions about the right approach to adopt as a matter of policy.

224. Mr Penny was as a result more likely to have said no even without the non-disclosure; for him the presence of fixed plant on the (or in fact another) policy would have been an error which should not be compounded. But also, he was less likely to feel quite as strongly morally obliged to the client. Taking all these factors together, I conclude that Mr Penny would not have added the Eggersmann plant to the Policy if the extra information had been disclosed.

225. However, I am not satisfied that Mr Penny would have cancelled the Policy at September on the basis of these facts. Refusing to add the new plant is one thing. Cancelling a policy part way through the year is another; it is an extremely serious matter, far more so than refusing to renew. It would be even more so, so close in time

to renewal. That decision would have very serious implications for the insured, and Mr Penny's evidence was clear (and consistent with the other Zurich witnesses' evidence) that he took a very responsible view so far as this sort of consideration was concerned. Cancelling would also have been, at least to an extent, inconsistent with the renewal at December 2014.

226. I conclude: in September 2015 if this risk had been referred to him with this extra information, Mr Penny would have refused to add the Eggersmann plant, and he would probably have ensured that renewal terms for 2015/2016 were at least significantly less generous, if not "discouraging". But he would not have cancelled cover for the existing plant at this point.

227. This conclusion is, in fact, exactly reflected in his evidence: "*We could have turned round and said, no, place that with a property insurer. You are going to have to do that from December anyway*." I conclude that this is exactly what Mr Penny would have done and said.

The Millennium Renewal Terms and Aspen defences

228. In the circumstances these issues, which relate only to the September extension, are immaterial. Further, as regards both points, my conclusion was that they add nothing to the points already dealt with.

229. While the Aspen Defence might (subject to the issue of knowledge) add another material issue, it is not a point which would pass the inducement hurdle by itself, particularly given the circumstances, which appear to have been that Mr Betts had either not been told of the special conditions or did not take enough care to check the proposal form. It may have been a case of Niramax's left hand not knowing what the right hand was doing, or it may well have been a case of carelessness by Mr Betts; but in moral hazard terms on either hypothetical it was in my judgment not likely to make the difference by itself, in the context of this long term insurance relationship. Mr Penny's answer on this may have been triggered by a very favourable depiction of the factual setting, but his readiness to accept this point was indicative of where on the scale it was.

230. As regards the Millennium Renewal Terms defence, aside from a question as to Niramax's knowledge (given that Mr Sweeney apparently did not tell Niramax of the condition), in circumstances where the renewal was expressly sought on the basis that fire suppression was going to be fitted it is again hard to see this as a point which would have had more than a small impact on inducement; and Mr Penny's evidence was consistent with this conclusion.

The other issues

231. I turn now to deal with the remaining issues. I can do so relatively briefly since it was my clear view that none of them afforded a basis for avoidance.

232. The first is the Sweeney Representation Defence – the alleged non-disclosure to Zurich of Mr Sweeney's false assertion to Miles Smith, London in January 2014 that the risk had "*surveyed very well*". This was said to be contrary to the then most recent surveys of Niramax's premises (in January 2013 and March 2013 undertaken for Aviva) which had revealed breaches of insurance policy conditions/warranties and a very high

exposure to the risk of arson and had imposed a range of risk improvements which Niramax had failed to comply with at all.

233. This however faced a fatal difficulty in that there was no evidence that Niramax knew that any such representation had been made to Millennium. The question of knowledge was not raised with Niramax's witnesses. The statement, viewed in its fairly complicated context, was a piece of broker's puffery, which only circulated between Mr Sweeney and Miles Smith (who was not actually the agent acting for Millennium). Mr Penny accepted that the basis of the case for this misrepresentation argument was mistaken.

234. I would add that I would have if necessary concluded that it was not material. The statement was essentially a broker "puffing" his client and made in relation to a survey which the insurers themselves had at a time when they were getting hold of more up to date surveys; it was merely Mr Sweeney telling them his reading of a document which they could equally well construe for themselves. It came in the context of an obvious "sales job" by Mr Sweeney, describing the risk as "*an absolutely superb risk of its type*". I would incline to the view that no prudent underwriter would give the existence of this sort of communication against this background the least bit of weight.

235. The second was the 2012 Fire Defence – the alleged non-disclosure in December 2014 of a fire in November 2012, at Tofts Road (the tyre crumb location). The relevance of this event in terms of materiality seemed overstrained given that (as was in effect common ground) Niramax did not own, operate or insure the site at the time of the fire, and there were no buildings there, and that small fires were effectively to be expected in this business. The expert views were that historic fires (ie those within the last five years) *"at an insured's facilities are material to a prudent underwriter, even if they result in no insured loss"*; that begs the question of a fire located as was this.

236. Their views also seemed to be potentially based on a perception of the fire as rather more serious than it actually was. Mr Antropik gave evidence that the fire was very minor, and very quickly and simply extinguished. While that may have been a slightly optimistic assessment, and plainly a number of fire brigade personnel attended, it was not a major fire – as the fire report indicated. But in any event Mr Penny's evidence in cross-examination did not suggest that he regarded this matter seriously so as to have any effect on inducement, and the inducement hurdle is therefore not cleared.

237. Third in line was the 2006 Fine Defence, alleged non-disclosure of convictions of Niramax in 2006 for illegally stockpiling around 128,000 tyres between August 2005 and March 2006 without a licence and for failing to remove the tyres following receipt of a notice requiring Niramax to do so.

238. This was not really cross examined upon by Zurich, and rightly not. While the experts were technically *ad idem* that this was material, I do not accept that evidence given the staleness of the conviction , that it related to a separate company and the fact that it related to an entirely different location, as well as the changes in management since that time. Indeed, Mr Coates accepted that it might not be material given lapse of time. Certainly, even if it was material it would not by itself (or taken with any or all of these other defences) have induced Mr Penny either to refuse to write the risk or to write it on different terms. He candidly accepted this, saying that he would not have been worried about it.

239. Fourth was the Dean Fine Defence – the alleged non-disclosure of a conviction dated June 2009, of Mr Dean for unlawfully depositing controlled waste between July 2007 and January 2008. Again, this can be dismissed with relatively little ado. Again, Zurich did not cross-examine on this. Mr Betts stated in his evidence that the fine was not something that he would have thought needed to be disclosed to insurers in subsequent years, and that view made perfect sense given (*inter alia*) that the conviction had been spent for over six months and Mr Dean was not a director of Niramax at the time of the fine or the renewal. The views of the expert underwriters on this were not persuasive, and appeared to be based on a view of materiality which was divorced from the question of risk. Mr Penny again did not really suggest in his evidence that this would have played any real part in inducement, and I conclude that the inducement hurdle is not met.

240. The final point was the supposed non-disclosure of Niramax's breach of duty for failing to disclose material facts on earlier renewals or occasions when the material facts should have been disclosed. This argument also fails on the point of Niramax's knowledge; there was no evidence that Niramax knew that it had previously failed to disclose material circumstances. It would also, given the conclusions above, have failed on the facts.

Return of premium

241. It follows that Zurich must repay to Niramax the premium that it has received for the September extension, that is an amount of £32,782.62.

Quantum

242. In the premises, this arises only in part. However, for completeness I deal with all the quantum issues below.

243. It is common ground that at the time of the fire the sums insured under the Policy were (a) £5,012,000 for Niramax's owned plant and (b) £150,000 for Niramax's liability relating to hired-in plant. Both owned plant and hired-in plant were destroyed by the fire.

244. The amount of Zurich's liability for the 3 items of hired-in plant that were lost in the fire are agreed in the total sum of £82,350.

245. The values of Niramax's owned plant were the subject of the dispute.

246. The Policy provides that Zurich shall pay "*the market value of the item at the time of the loss or damage.*" Zurich's internal guidance is that this means "*the cost of a replacement item of similar age and condition*".

247. The result is that:

    i) If the insured has that item to use and it is totally lost, the indemnity is the price in the market to get another similar one to use, provided that a market exists.

    ii) If the item is one for which there is a second-hand market, the basis for indemnity is therefore likely to be the market price; but, if there is no such

market, the only way to indemnify the insured may be to repair it (at unreasonable cost) or to replace it with a new one;

iii) The market value will in principle be measured at the place of the loss.

248. The dispute is summarised in tabular form thus:

Item	**Niramax's expert (Mr Correa)**	**Zurich's expert (Prof Sheldon)**
Eggersmann Mechanical Treatment Plant	£4,308,582	£3,765,828
Liebherr 904 Excavator (53081)	£126,000	£85,355
Liebherr 904 Excavator (45914)	£127,750	£99,022
Liebherr LH 24M Material handler	£165,750	£121,000

Eggersmann plant

249. In the light of my conclusions so far, this item does not arise. However were it to do so, the dispute turns on (a) different exchange rates, and (b) depreciation.

250. As to the exchange rate, Mr Correa applied the rate applicable on the date of the fire based on publicly available information. Professor Sheldon used the rate quoted by Eggersmann in an invoice dated 3 December 2014. I conclude that the former approach was to be preferred. In particular Professor Sheldon appeared to have misread the invoice in a number of respects and in particular had not appreciated that the invoice price was in Euros, and the stated exchange rate was expressly "*for information only*". Although the replacement would have to be purchased from Eggersmann, the exchange rate used would be likely not to be static, but to vary roughly in line with the actual exchange rate fluctuations.

251. As to depreciation, I also preferred the evidence of Mr Correa for Niramax that the market value of the plant was its purchase price, since it was handed over as new so shortly before the event. Professor Sheldon's own evidence was that the machine was virtually as good as new. Although this results in essentially a "new for old" price, which is not the usual indemnity measure the facts here are unusual, in that the machine was in effect brand new.

252. Against that background Professor Sheldon's approach that one should take the price at which the Eggersmann plant (having been commissioned) could have been sold by Niramax to another company is not attractive. It is also to an extent an "apples and oranges" comparison; it is not what it would have cost for Niramax to purchase a replacement machine at the date of the fire.

253. I accept the submission that the best evidence of the cost of replacement was Eggersmann's quote for a replacement, as recorded by Zurich after the fire, namely €6m.

254. Professor Sheldon's argument that there would further be a c.30% discount on the prior purchase price of the Eggersmann plant, on the basis that it had already carried out design works for the plant appeared to be speculative and unsupported, given that Eggersmann was the only source of a replacement plant. I conclude that the correct valuation for this item is: £4,308,582.

Liebherr machines

255. I also prefer Mr Correa's evidence as regards the values of the three other items of owned plant (two Liebherr 904 excavators and one Liebherr 24 M material handler). This depended in part on what seemed to be a greater relevant expertise on the part of Mr Correa in particular as regards loss adjusting and loss assessment, and also on the specific treatment of the points.

256. Firstly, Professor Sheldon's analysis in relation to the 24M material handler assumed a purchase price of £142,000. The asset register and Mr Sweeney's email of 10 March 2016 both refer to a purchase price of £170,000 and that was the figure which Zurich's solicitors had ascertained was the purchase price from the documents.

257. Professor Sheldon's figure appeared to derive from a spreadsheet handed up on Day 7 of the trial, which had not formed part of the trial bundle and was not appended to his report, nor to the joint statement. It had not been discussed between the experts despite Professor Sheldon knowing that Mr Correa's understanding was that the purchase price of the machine was £170,000. Its nature, its author, purpose, date and other relevant details of the document were, even at the trial, unclear. That is not a satisfactory basis for drawing a conclusion.

258. The next issue related to the fact that it appears that there is (at least currently) a dearth of the relevant vehicles for sale in England, since neither expert could find them in the UK market. This led to very divergent approaches, with Professor Sheldon relying on actual prices and Mr Correa using a theoretical approach based on a depreciation rate applied to the purchase price.

259. Although there is a natural tendency to prefer actual over abstract, I was not persuaded that Professor Sheldon's figures were robust. There were a number of factors in this. The first is that Professor Sheldon's valuations were based on extrapolating from a single quoted 2019 price for each of those models, when a degree of selection had apparently taken place given that: (i) the quotes came from different sources and (ii) it was Professor Sheldon's evidence that there were higher quotes (though he was unable to assist the Court as to the amounts of those higher quotes).

260. Secondly, Professor Sheldon's approach was incomplete in any event, in that each of the prices was based on a foreign sale but the estimate did not take account of the facts necessary to turn this quote into an "as if" price for buying replacement plant in England. These would include transport costs, insurance and permits and could be substantial.

261. Thirdly, Professor Sheldon's calculations suggest that the items of plant depreciated at different annual rates (of 7.8%, 5.5% and 7.3%) but it was not clear – particularly in relation to the essentially identical Liebherr 904 excavators - why there should be different rates of depreciation in respect of the three machines.

262. Mr Correa's valuations were based on applying an average 2.5% annual depreciation rate to the purchase prices (in 2011, 2010 and 2014 respectively). That consistency is more credible and was supported by Mr Correa's evidence based on his expertise in this area.

263. His figures arrived at also tallied well with:

i) Figures based on the 2019 quotes from Liebherr and applying relevant discounts backwards to 2015. This produced figures substantially higher than those suggested by Mr Correa.

ii) The figure given by Crawfords (the highly experienced loss adjusters appointed by Zurich). They gave an estimated indemnity value for the owned plant (other than the Eggersmann machine) of £450,000.

Conclusion

264. In the circumstances I conclude that the claim succeeds in part only – that which relates to the non-Eggersmann equipment, that the extra premium charged for the September extension falls to be returned and that the counterclaim fails.